for the protection of the goods kept by them. The Authority must show that the loss was not due to their negligence.

The contention of the appellants that the onus was on the bailors to show that appellants as bailees were negligent found no favour with the learned judge. This submission was also made in the case of *Port Swettenham Authority* v. *T. W. Wu & Company (M) Sdn. Bhd.*[1] where we held that the learned judge was right on the question of onus. In our view, where a bailor and bailee relationship exists then the position is the same as the common law, that is, the onus is on the bailee for reward to show that the loss of the goods was not due to his negligence.

In this case the Traffic Manager (DW1) gave evidence of system and security. The Chief Clerk (DW2) of the yardstore also gave evidence. But, both of them had no knowledge of the particular consignment. They could not, therefore, give evidence about the missing goods which might be of assistance to the court. Suffice to say that the learned judge was right on the evidence in this case to hold that the appellants had failed to show that the loss occurred otherwise than through their negligence. There is no reason for the court to interfere with his finding of facts.

We are aware that the Port Authority handled a considerable amount of cargo and pilferings were inevitable. But, when a whole consignment of bulky and heavy goods simply just disappeared from the watchful eyes of the port employees then something must be wrong with the system of protection of goods in the care and custody of the Authority. There is much force in the argument of the respondents that appellants could not be said to have devised and evolved a reasonable system of security when there were so many claims of shortlanding and non delivery of goods amounting to millions of dollars. There was practically no investigation in respect of port employees involved in releasing and checking goods at the store and gate. It seems bulky and heavy goods could be taken out of the port area with considerable ease. It is, therefore, not surprising that the learned judge should make these observations:—

"In consideration I am strongly inclined to conclude that the irresistible inference that arises was that the goods, if stolen, could only have been committed either by the failure of the defendants or of their employees to exercise such care and diligence required of them by law. I am indeed of the view that in all probability the theft, if committed, could not indeed have been done otherwise than through active participation or complicity of one or more of the defendants' employees."

This appeal would also be dismissed with costs here and in the court below.

Appeal dismissed.

Solicitors: *Tunku Zuhri, Manan & Abdullah; Lovelace & Hastings.*

HAJI NIK ISHAK BIN HAJI NIK DAUD v. NIK ZAINAB BINTI NIK JAAFAR

[F.C. (Suffian L.P., Ali and Wan Suleiman F.JJ.) March 10, 1975]

[Kota Bharu — Federal Court Civil Appeal No. 53 of 1973]

Contracts — Sale of land — Agreement that balance of purchase price to be paid by third person — Vendor cannot subsequently claim balance from purchaser — Contract Act, 1950, s. 42.

In this case the appellant had transferred his land to the respondent and the respondent had transferred her land to the appellant. The appellant's case was that the consideration for the transfer of his land was $25,000 and that for the respondent's land was $14,000 thereby leaving a balance of $11,000 which was agreed to be settled by (a) Nik Hassan $4,000 and (b) Nik Abdul Majid Yahya $7,000. Both Nik Hassan and Nik Abdul Majid were the sons of the respondent. Nik Abdul Majid did not settle the sum of $7,000 as agreed and the appellant thereupon claimed payment from the respondent. His claim was dismissed in the High Court and he appealed to the Federal Court.

Held, dismissing the appeal; as the appellant had agreed to accept performance of the promise from the third person, he could not under section 42 of the Contract Act, 1950, enforce it against the respondent.

FEDERAL COURT.

A. Wilson for the appellant.

Datuk Wan Mustaffa for the respondent.

Ali F.J.: This is an appeal against the dismissal of the appellant's claim for $7,000.

The claim arose out of a transaction involving the transfer of appellant's land, Lot No. 60, to the respondent and the transfer of respondent's land, Lot No. 177, to the appellant. Both transfers were executed on March 21, 1965.

The appellant's case, as stated in the pleadings, is that the consideration for the transfer of Lot No. 60 was $25,000 and that for Lot No. 177 was $14,000, thereby leaving a balance of $11,000 which was agreed to be settled by (a) Nik Hassan Yahya, $4,000, and (b) Nik Abdul Majid Yahya, $7,000. Both Nik Hassan and Nik Abdul Majid are the sons of the respondent. In this appeal we are only concerned with the sum of $7,000 which was agreed to be settled by Nik Abdul Majid.

The manner in which Nik Abdul Majid Yahya was to settle the amount is described in paragraph 6(c) of the statement of claim in these words —

"The defendant's son Nik Abdul Majid Yahya agreed to build and complete a building on plot No. 5 of Lot No. 47 Section 24, Kota Bharu and to transfer the said plot of land and building to and for the benefit of the *defendant's* nominee Nik Halimah binti Abdul Rahman for the value of $16,000 and agreed to acknowledge receipt of payment of a deposit of $6,300 and $700 for additions to the building and loan charges from the balance of the said consideration due from the defendant to the plaintiff;"

(The word "*defendant's*" as italicized appears to be a typing error. It should read "*plaintiff's*").

Immediately following the above stated averment the appellant went on to say that Nik Abdul Majid made oral representation that he had the power and authority to sell the land and house to Nik Halimah and it was on such representation that he (the appellant) accepted the offer to settle. Having said that, he went on to allege that the said representation by

Nik Abdul Majid was false and untrue in that he (Nik Abdul Majid) did not have the power and authority to sell the land and house to Nik Halimah. Then, apparently in anticipation of the defence reliance on the said agreement with Nik Abdul Majid the appellant contended that it cannot be so relied upon being void for false representation and also for lack of consideration. Paragraphs 16 and 17 of the Statement of Claim contained these averments. Such was the appellant's case as it stood on the pleadings before the trial court.

The respondent's defence was a denial of the liability to pay the amount claimed on two grounds, namely (a) that the consideration for Lot No. 60 was not $25,000 but $10,000 and (b) Nik Hassan and Nik Abdul Majid were not acting as agents for the respondent when they respectively agreed to settle the balance of the purchase price.

On the question whether the consideration for Lot No. 60 was or was not $25,000 as in (a) above the evidence at the trial may be summarised as follows: The appellant and his witness, Nik Hashim, stated on oath that on March 20, 1965, i.e. before the transfer, there was a meeting in Nik Hassan's house when Nik Hassan and Nik Abdul Majid agreed that $25,000 was to be the consideration for the transfer of Lot No. 60. Nik Hassan was not called to give evidence but Nik Abdul Majid was. He denied any such meeting or agreement. He admitted, however, that there was a meeting on March 20, 1965 in his mother's house. He did not elaborate. The respondent also gave evidence. She said this "I do not know for how much the plaintiff was to transfer the land to me. I went to land office just to sign the transfer." The Memorandum of Transfer in respect of the transaction on March 21, 1965 as filed in the land office shows the amount $10,000 as the consideration for the transfer of Lot 60. There was also in evidence the Memorandum of Transfer dated September 10, 1958, relating to a previous transfer of Lot No. 60 from Nik Yahya to Wan Salleh. Nik Yahya is the husband of the respondent or the father of Nik Abdul Majid and Nik Hassan. The significance of this previous transfer is that Wan Salleh appeared to have paid $22,000 for Lot No. 60. That was some seven years ago. Since it is common knowledge that prices of land in towns do not go down but up I would say without any fear of contradiction that the appellant, undoubtedly a shrewd businessman, could not have agreed to accept $10,000 as the purchase price for Lot No. 60. For this reason I incline to accept as true the evidence that the figure $10,000 was put in the Memorandum of Transfer dated March 21, 1965 on the instruction of Nik Abdul Majid solely for the purpose of avoiding the payment of higher stamp duty. The learned trial judge, however, was content to say this in his judgment:

"Even if whatever the plaintiff said about this is true, the fact remains he was fully aware of the value stated in the memorandum of transfer when he executed it. He was the master of the situation at the time. He could have insisted upon the correct entry in the memorandum if he did not consider anything in it to be proper. In any case, I would say the exchange of property by itself is more than a fair one, considering that his wife got a piece of property valued at $14,000 in return for a piece of property which he originally got through 'jual janji' transactions at the sum of $12,000. The fact that he was master of the situation is shown by the extras he got in the form of the second and third transactions. It may be that when the 3 transactions were entered into the value of lot 60 attached by the plaintiff got lot 177 which was valued at $14,000, the second transaction $4,000 and the third transaction $7,000."

As I understand this passage the trial judge did not reject the appellant's evidence that the real consideration as agreed was $25,000. On the evidence as a whole I do not think he could. However, the more important question in this case is whether the respondent is liable for the balance of the purchase price, particularly the amount $7,000. But for the agreement between the appellant and Nik Abdul Majid which is admitted I would have no hesitation in giving an affirmative answer. The effect of the said agreement, as it seems to me, is that upon the appellant's acceptance of Nik Abdul Majid's promise to pay or settle the amount $7,000 the respondent was discharged from the liability to pay. The law here, in my view, is the same as in India. I am referring, of course, to section 42 of the Contracts (Malay States) Ordinance 1950 which is identically the same as section 41 of the Indian Contract Act. The commentary on the said provision in Pollock and Mulla, 9th Edition, at page 361, seems to suggest that the law in England is different. Our section 42 or section 41 of the Indian Contract Act provides as follows:

"When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor."

By raising the question of false representation or lack of consideration in respect of the agreement with Nik Abdul Majid the appellant was clearly seeking to avoid the effect of section 42. As it happened in this case the learned trial judge rejected the allegation of false representation. He said that neither the appellant nor Nik Halimah was deceived as to the true position of Nik Abdul Majid when he promised to sell the house to Nik Halimah. With respect I agree. If I may add the appellant saw in this arrangement with Nik Abdul Majid the opportunity of killing two birds with one stone. Firstly, it enabled his friend, Nik Halimah, to purchase land and house in the housing estate; and secondly, to ensure that the $7,000 would be paid direct to him by Nik Halimah. All that Nik Abdul Majid had to do was to give a written acknowledgement for the amount which he in fact did. When he admittedly failed to give Nik Halimah the house after it was completed it might well be that he was in breach of his agreement. Assuming there was a breach does it entitle the appellant to say to the respondent "Well, since Nik Abdul Majid has failed to fulfil his promise, I hold you liable for the payment of $7,000." The answer as given by the trial judge is that he is not entitled. For the reason already stated I respectfully agree with him. The appeal, therefore, fails.

On the question of agency which was raised by the respondent I do not think it is necessary for me to consider it having reached the conclusion that she is not liable.

Accordingly the appeal is dismissed with costs.

Suffian L.P. and **Wan Suleiman F.J.** concurred.

Appeal dismissed.

Solicitors: *Wilson & Co.; Wan Mustaffa & Co.*